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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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7
XIMPLEWARE CORP.,

Case No. 13-cv-05160-SI

Plaintiff,

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v.

ORDER RE: PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION
AND DEFENDANT'S
ADMINISTRATIVE MOTION TO FILE
UNDER SEAL

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VERSATA SOFTWARE, INC.; TRILOGY
DEVELOPMENT GROUP, INC.;
AMERIPRISE FINANCIAL, INC.; and
AUREA SOFTWARE, INC.,

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Defendants.

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On November 21, 2014, the Court held a hearing on plaintiff XimpleWare Corporation's

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motion for preliminary injunction. Docket Nos. 102, 125. Also before the Court is defendant

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Versata Software, Inc.'s motion to file under seal. For the reasons set forth below the Court

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GRANTS IN PART and DENIES IN PART XimpleWare's motion for preliminary injunction; and

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GRANTS Versata's motion to file under seal.

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BACKGROUND

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Plaintiff XimpleWare is a California corporation that develops, designs, and distributes

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computer software. First Amended Complaint (FAC) ¶¶ 2-3. Zhengyu Zhang and Hui Tian

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founded XimpleWare in 2002 and in 2004 Zhang began writing the XimpleWare source code. *Id*.

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¶¶ 19-20. This source code is an "XML parser," which is a piece of software that reads and

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translates information stored in Extensible Markup Language (XML) documents. *Id*. ¶¶ 16-18.

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According to XimpleWare, its source code and software product, known as "VTD-XML," reads

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and parses XML at a rate estimated to be five to ten times faster than other current XML parsing

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programs. *Id*. ¶ 35. XimpleWare decided to license its source code as open source software under a GNU General Public License (GPL).[1] *Id*. ¶ 26.

In summer 2013, XimpleWare learned of a lawsuit brought by Versata Software Inc. against Ameriprise in Texas state court, alleging that Ameriprise materially breached Versata's DCM software license. *Id*. ¶¶ 49, 50. On November 5, 2013, XimpleWare filed this suit against Versata and Ameriprise for copyright infringement, violation of the Lanham Act, breach of contract, breach of good faith and fair dealing, unjust enrichment, intentional interference with prospective economic advantage, unfair competition, and declaratory relief.[2] Docket No. 1. XimpleWare claims Versata is liable for copyright infringement, alleging Versata's DCM software product incorporated XimpleWare's VTD-XML and that Versata commercially distributed its DCM product without obtaining a commercial license or permission for the use of XimpleWare's products, or complying properly with the GPL license. FAC ¶¶ 55-58. Additionally, XimpleWare alleges that Ameriprise distributed Versata's DCM and VTD-XML to thousands of non-employee financial advisors, thereby violating the GPL.[3] *Id*. ¶¶ 60-61.

XimpleWare seeks a preliminary injunction barring: (1) Versata from delivering new copies of the DCM software to its customers or otherwise publishing the DCM and; (2) Ameriprise from deploying the DCM to new or existing users. Motion at 1. This is XimpleWare's second motion to enjoin defendants; the Court denied XimpleWare's motion for a Temporary Restraining Order in December, 2013.[4] Docket Nos. 12, 45.

On November 10, 2014, the Court issued an order directing Versata to come to the hearing on plaintiff's Motion for Preliminary Injunction prepared to present to the Court and XimpleWare

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[1] Open source software is software whose source code is available to the public, free of charge, to use, copy, modify, sublicense, or distribute, subject to the terms of an open source license. FAC ¶ 23. The GNU General Public License is an open source license that prohibits users from copying, modifying, sublicensing, or distributing the software except as expressly provided under the license. *Id*. ¶ 32.

[2] The initial complaint was amended on December 17, 2013. Docket No. 48.

[3] XimpleWare maintains Ameriprise made these outside distributions without any attribution to XimpleWare, without XimpleWare's copyright notice, without reference to XimpleWare's source code, and without any offer to convey the XimpleWare source code. FAC ¶ 61.

[4] Previously, the Court held that XimpleWare failed to show irreparable injury, and therefore denied its application for a Temporary Restraining Order. Docket No. 45.

1   proof that the DCM patch is installed and functioning for all of Versata's DCM customers as well

2   as a statement from Ameriprise that the second patch provided by Versata is functioning. Docket

3   No. 119. At the hearing held November 21, 2014, the Court instructed Versata to file with the

4   Court documentation as to the functioning of the patch at its customers.

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6   **DISCUSSION**

7   **I.   XimpleWare's Motion for Preliminary Injunction**

8   "[I]njunctive relief to prevent copyright infringement is available as an equitable remedy

9   in the court's discretion." *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 994 (9th

10   Cir. 2011). In order to obtain a preliminary injunction, a plaintiff "must establish that he is likely

11   to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary

12   relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

13   *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008) (citations omitted). This is

14   commonly referred to as the "four-factor test" for preliminary injunctive relief. *Flexible Lifeline*

15   *Sys., Inc.*, 654 F.3d at 994. The Supreme Court has been "very clear that even where infringement

16   had been proven, a plaintiff may not be granted injunctive relief until he satisfies the four-factor

17   test, which includes demonstrating irreparable injury."   *Id*. at 995 (citing *eBay Inc. v.*

18   *MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006)).[1] This principle applies to both patent and

19   copyright cases: "a presumption of irreparable harm is equally improper in a case based on

20   copyright infringement as it is in a case based on patent infringement." *Id*. at 996 (citing *eBay*,

21   547 U.S. at 388).

22   XimpleWare renews its prior request for an injunction, arguing that Versata has failed to

23   uphold the representations it made to the Court over ten months ago. Reply at 2. At the previous

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26   [1] The Ninth Circuit had a "long-standing practice of presuming irreparable harm upon the showing
     of likelihood of success on the merits in a copyright infringement case." *Flexible Lifeline Sys.,*
     Inc. v. Precision Lift, Inc., 654 F.3d 989, 995 (9th Cir. 2011). However, since the Supreme
27   Court's decisions in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) and *Winter v.*
     Natural Resources Defense Council, Inc., 555 U.S. 7 (2008), this practice is no longer good law.
28   *Id*.

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1   hearing on XimpleWare's motion for a temporary restraining order, the Court noted the

2   representations made by Versata that they had no new sales of their DCM software, did not

3   anticipate any additional sales during the 2013 calendar year, and that all references to

4   XimpleWare in the previously created versions of DCM were removed and a patch was created

5   and would be sent to all of Versata's customers. Docket No. 46, pg. 37. The Court also stated that

6   it would require, in the future, proof that the representations made by Versata did in fact happen.

7   *Id.*

8   XimpleWare contends that to date, it has not been offered any evidence of Versata's

9   delivery of a successful patch to its DCM customers. Docket No. 103, Russo Decl. ¶ 8; Docket

10   No. 104, Halliburton Decl. ¶ 5; Reply at 2. At the November 21, 2014 hearing, Versata

11   represented to the Court that it had delivered and installed the patch to four of its eight DCM

12   customers and the patch was successfully functioning for those customers. Docket No. 124 at 7.

13   Versata further stated that it delivered the patch to its four other DCM customers but could not

14   represent that the patch was commercially installed or functioning. *Id.* XimpleWare then

15   requested injunctive relief in the form of a Court order instructing Versata to comply with a final

16   deadline or require Versata to procure a license from XimpleWare.[5] *Id.* at 8. Versata stated that

17   buying a commercial license to use XimpleWare is "something that Versata would be happy to

18   do." *Id.* at 14.

19   Therefore, the Court orders that by no later than **February 28, 2015**, Versata must provide

20   to the Court evidence—similar to that it provided at the November 21, 2014 hearing—that the

21   patch is commercially installed and functioning at the remaining four DCM customers, or

22   alternatively show cause why it has not purchased a license from XimpleWare to account for the

23   remaining users of XimpleWare's VTD-XML product.

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27   [5] Versata's Request for Judicial Notice, filed after the November 21, 2014 hearing, suggests that
     XimpleWare is requesting that this Court order Versata's customers to purchase a license from
     XimpleWare. Docket No. 127 at 2. However, as discussed at the November 21, 2014 hearing, the
28   issue is whether "Versata should just buy a commercial license to use XimpleWare." Docket No.
     124 at 14. With the exception of Ameriprise, Versata's customers are not parties to this action.

1   **II.   Versata's Administrative Motion to File Under Seal**

2   Versata has filed an administrative motion to file under seal documents submitted to the

3   Court in compliance with the Court's November 21, 2014 instruction and November 10, 2014

4   order. Docket No. 121. Versata has submitted the declaration of Steven Mitby in support of its

5   administrative motion. Docket No. 121-1.

6   With the exception of a narrow range of documents that are "traditionally kept secret,"

7   courts begin their sealing analysis with "a strong presumption in favor of access." *Foltz v. State*

8   *Farm Mut. Auto. Ins.*, 331 F.3d 1122, 1135 (9th Cir. 2003). "A stipulation, or a blanket protective

9   order that allows a party to designate documents as sealable, will not suffice to allow the filing of

10 documents under seal." Civ. L.R. 79-5(a). When applying to file documents under seal in

11 connection with a dispositive motion, the party seeking to seal must articulate "compelling reasons

12 supported by specific factual findings that outweigh the general history of access and the public

13 policies favoring disclosure, such as the public interest in understanding the judicial process."

14 *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (internal

15 quotations and citations omitted). Where a party seeks to seal documents attached to a non-

16 dispositive motion, a showing of "good cause" under Federal Rule of Civil Procedure 26(c) is

17 sufficient. *Id*. at 1179-80; *see also* Fed. R. Civ. P. 26(c). In addition, all requests to file under seal

18 must be "narrowly tailored," such that only sealable information is sought to be redacted from

19 public access. Civ. L.R. 79-5(b).

20   The Court has considered each of the documents designated as confidential and the

21 corresponding declaration and concludes that Versata has sufficiently shown good cause for filing

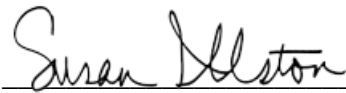22 the documents under seal. Accordingly, the Court GRANTS Versata's motion to file under seal.

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24   **CONCLUSION**

25   Versata is hereby ordered to provide the Court evidence that the patch is commercially

26 installed and functioning at the remaining four DCM customers no later than February 28, 2015,

27 or show cause why it has not purchased a license from XimpleWare to account for the remaining

28 users of XimpleWare's VTD-XML product.

1   The Court also GRANTS Versata's motion to file under seal.

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4   **IT IS SO ORDERED**.

5   Dated: November 25, 2014

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     SUSAN ILLSTON
7   United States District Judge

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